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No. 83-688

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CALVIN COOLIDGE GREENE,
Petitioner,

vs.

WHIRLPOOL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

I.

Whether the Petitioner is barred from pursuing an action under the ADEA where he failed to file a written charge alleging unlawful discrimination on the basis of age as required by 29 U.S.C. § 626 (d).

II.

Whether the filing provision of 29 U.S.C. § 626 (d) is tolled where an employer does not post the required informational notices concerning age discrimination, *but* the claimant has actual notice of his rights, visits the appropriate agency within two weeks after the alleged discrimination took place, and receives and reads a pamphlet from the agency which sets forth information concerning age discrimination and does nothing thereafter.

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STATEMENT OF THE CASE

This action was brought under the Age Discrimination in Employment Act (ADEA). The District Court denied Respondent's Motion To Dismiss made at trial which was based upon the Petitioner's failure to file a charge of discrimination as required by 29 U.S.C. §626(d). The Court of Appeals for the Fourth Circuit reversed the District Court and held that the case should be dismissed because the Petitioner failed to comply with the requirements of §626(d). Thus, the issue involved in the Petition for Writ of Certiorari is whether the Petitioner is barred from bringing this action because he failed to file a charge alleging unlawful discrimination as required by 29 U.S.C. §626(d).

The Petitioner was 47 years old when he was hired by Respondent's Charlotte Branch as a Builder Territory Manager (salesman). In the late 1970's the Charlotte Branch began having serious personnel problems. Whirlpool sent representatives from its home office in Benton Harbor, Michigan to investigate the problems and to determine how to improve employee morale. As a result of these investigations, Whirlpool headquarters reorganized its Charlotte Branch in an effort to correct the personnel problems. Numerous employees of all ages were either transferred, demoted, or terminated. The Petitioner was one of those terminated during this period.

The Petitioner was terminated as of October 31, 1977. Approximately two weeks later, on November 17 or 18, 1977, the Petitioner went to the Department of Labor where he told Bob Smith that he thought he had been fired because of his age.[1] Smith instructed the Petitioner that if he found enough information regarding his claim of age discrimination to get back with the DOL. Smith also sent the Petitioner a booklet entitled "Discrimination in Employment" which explained Petitioner's rights and which he received on November 21, 1977. The Petitioner did not return to the DOL until two years

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[1] In 1977, when the Petitioner was required to file a charge, the DOL was the enforcing agency for the ADEA. However, on July 1, 1979, the responsibility for enforcement of the ADEA was transferred to the Equal Employment Opportunity Commission (EEOC). Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979), *reprinted in* [1978] U.S. Code Cong. & Ad. News 9795.

later when all he did was to ask if it had a record of his visit in 1977. The Petitioner gave no additional information to the DOL nor took any other action regarding filing a charge.

The Petitioner is an educated man having completed two years of study at the University of New Hampshire. He acknowledged that he received the pamphlet explaining his rights under the ADEA and that he read it. However, he did nothing for two years. Then in 1979 he went to the DOL but at that time he still failed to comply with the basic requirement of filing a charge.

The District Court held that the Petitioner filed a charge both when he visited the DOL in November 1977 and again when he went in 1979. The District Court also held that Whirlpool's failure to post the required ADEA information notices tolled the time for filing a charge until September 1979. In making its decision the District Court ignored the evidence at trial regarding the Petitioner's visits to the DOL and also found facts not in evidence. The Petitioner attempts to create evidence by referring to the trial court's Order as a summary of the evidence. This bootstrapping effort fails because the trial court's findings were *simply contrary to the evidence*. In denying Whirlpool's motion to dismiss made at trial, the judge stated that although the Petitioner received the DOL explanatory pamphlet regarding age discrimination in November, 1977, ". . . the evidence does not show that Greene read and understood it . . . ." However, the Petitioner's own testimony illustrates that he read the pamphlet and everything in it. In relating his conversation with Mr. Smith in November, 1977, the Petitioner testified:

> A. He told me they were out of the booklets they had that explained the discrimination case . . .
> App., p. 1, *infra*.

The plaintiff's testimony regarding receipt of the pamphlet was:

> Q. Well, now, did you read it?
> A. Yes, I looked through the booklet.
> Q. You read everything that was in the book?
> A. I must have. I looked through the booklet.
> App., p. 2, *infra*.

The Petitioner read the pamphlet that *explained* age discrimination cases and at that point he was put on notice of the statutory filing requirements. Yet, he did not return to the Department of Labor for

two years, and when he did, "he didn't tell him [DOL agent] anything." App., p. 3, *infra*. Obviously, the Petitioner never filed a charge, written or oral, in 1977 or in 1979.

Consequently, the Petitioner's argument that he filed a charge is unsupported by the evidence. Therefore, as the Fourth Circuit determined, based upon the actual facts of record, rather than the unsupported findings of the trial judge, the Petitioner never filed a written charge of discrimination. Indeed, as found in the concurring opinion, he didn't even file an oral charge.

In reversing the District Court, the Fourth Circuit found that in order to uphold the underlying purpose behind the statute, a written charge is required to satisfy the elements of 29 U.S.C. §626(d). Further, the Fourth Circuit determined that no charge alleging unlawful discrimination had been filed by the Petitioner. Finally the Fourth Circuit recognized that although the 180 day filing provision of §626(d) can be *waived* or *tolled*, such was not appropriate in this case where the evidence was clear that the Petitioner had actual notice of his rights under the ADEA within two weeks after his termination. Petitioner here raises two issues: (1) whether the notice provision of 29 U.S.C. §626(d) is satisfied by filing an oral charge; and (2) whether the notice provision of 29 U.S.C. §626(d) is tolled where an employer fails to post notices setting forth information concerning age discrimination, but the claimant has *actual* notice of such information.

RESPONSE TO PETITION FOR CERTIORARI

Summary

I. The Fourth Circuit's decision holding that 29 U.S.C. §626(d) requires a written charge upholds the underlying purpose of the ADEA and is completely consistent with decisions of this Court and other circuits. The court's decision that no written charge was filed is supported by the evidence of record.

II. The Fourth Circuit recognized that a written charge is not a jurisdictional prerequisite to filing a suit in federal court under the ADEA and that the requirement can be *waived or tolled*. However, under the circumstances in this case — where the Petitioner had actual notice of the law within two weeks after his termination, neither waiver nor tolling were appropriate.

I.

The Fourth Circuit's Decision That 29 U.S.C. §626(d) Requires A Written Charge Upholds The Purpose Of The ADEA And Is Consistent With The Rulings Of This Court And Other Circuits.

A. The Underlying Purpose Of The ADEA Is Upheld By Requiring A Written Charge Alleging Unlawful Discrimination.

Clearly, in making its decision, the Fourth Circuit recognized the importance of the underlying purpose of the ADEA. As the Petitioner contends, the purpose of the statute is to protect the rights of the elderly. One of the quickest and most appropriate ways of enforcing those rights is through the conciliation and informal conference procedures provided for in the statute. The importance of §626(d) and the effect of the 1978 amendments were discussed by the Fourth Circuit in its opinion:

> Prior to 1978, §626(d) required that a "notice of intent to sue" be filed with the DOL. In 1978, this provision was amended to require that a "charge alleging unlawful discrimination" be filed with the DOL.[2] In approving this amendment, the Conference Committee reported:
>
> "This change in language is not intended to alter the basic purpose of the notice requirement, which is to provide the Department with sufficient information so that it may notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation."
>
> H.R. No. 95-950, 95th Cong., 2 Sess. 12, *reprinted in* [1978] U.S. Code. Cong. & Ad. News 534. In the present case, because the Secretary had no knowledge of Greene's allegation of discrimination against Whirlpool, no opportunity existed for any informal methods of conciliation, conference and persuasion, as required by §626(b), before the initiation of the suit. This is patently contrary to the purpose of the notice requirement. (Footnote omitted).

As discussed by the Fourth Circuit, §626(d) allows the DOL to attempt to conciliate and thus eliminate any discrimination as quickly as possible. This protects the public as well as the private interest of the claimant.[2] The importance of the administrative proceedings provided for in the statute has long been recognized. While considering the type of damages to be allowed in an ADEA action, the Fourth Circuit, in *Slatin v. Stanford Research Institute*, 590 F.2d 1292, (4th Cir. 1979) stated:

> *The ADEA provides that resort must first be had to administrative remedies before a private suit may be filed.* Any individual who wishes to sue under the ADEA must give the Secretary of Labor sixty (60) days notice of intent to sue. Upon receipt of such notice, the Secretary is directed to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion." 29 U.S.C. §626(d). If such efforts fail, the Secretary may bring an action under the statute. Most significantly, the right to bring a private suit terminates upon commencement of an action by the Secretary. §626(c). *Thus, the entire thrust of the ADEA's enforcement provision is that private lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor.* (Emphasis added.)

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[2] Courts have consistently held that suit can be brought only after the 60 day conciliation period. *Ewald v. Great Atlantic & Pacific Tea Co., Inc.*, 620 F.2d 1183, 1188 (6th Cir. 1980) *vacated* and *remanded on other grounds*, 101 S. Ct. 311 (1980), *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1198 (5th Cir. 1975); *Coyle v. Spigner*, 477 F.Supp. 23, 24 (D.S.C. 1979); *Reich v. Dow Badische Co.*, 575 F.2d 363, 368 (2d Cir. 1978), *cert. denied*, 439 U.S. 1006, 99 S. Ct. 749 (1978); *Bengochea v. Norcross, Inc.*, 464 F.Supp. 709 (E.D. Pa. 1979).

To allow the Petitioner to proceed with his action without having observed the statutory prerequisite of conciliation negates the purpose of the ADEA. In addition, to allow the Petitioner's actions to be sufficient to fullfill the requirement of filing a charge would be to say that anyone who makes inquiry of a federal agency has filed a charge and would make the language of the statute meaningless. Here, the Petitioner failed to give the agency the information necessary for them to start the wheels of conciliation rolling. Having completely bypassed the statutory requirement of filing a charge, the Petitioner is barred from proceeding with this action.

The Petitioner cites *Mahasco Corp. v. Silver*, 447 U.S. 807, 816 (1980) as the test for determining Congressional intent in enacting a statute. Respondent agrees that an application of the standards of *Mahasco* clearly indicates that a written charge is required under the provisions of 29 U.S.C. §626(d). The *Mahasco* test requires examination of three elements: (1) the language of the statute itself; (2) the legislative history; and (3) the policies underlying the statute.

Addressing the first element, as the Fourth Circuit found, the language of the statute requiring that a charge be filed, implies that something must be written. See also *Reich v. Dow Badische Co.*, 575 F.2d 363 (2nd Cir.), *cert. denied* 439 U.S. 1006 (1978) (decided before the 1978 amendments). Papers, documents, and pleadings are "filed," oral arguments and statements are not. Accordingly, the language of the statute itself supports the finding that a written charge is required. In addition, the EEOC, which is currently charged with promulgating and enforcing the provisions of the ADEA, requires that a charge must be written to be sufficient. See 44 FR 37,975 (June 29, 1979).

The legislative history, the second element, also mandates that a *written* charge of discrimination is required under §626(d) of the ADEA. As pointed out in *Fulton v. NCR Corp.*, 472 F.Supp. 377, 23 FEP Cases 1595, 1597 (W.D. Va. 1979):

> Any doubt about the necessity of a written charge should be dispensed by the enactment of the Amendments, however. The Conference Committee approving these Amendments reported, 'This change in language is not intended to alter the basic purpose of the notice requirement, which is to provide the Department with sufficient

> information so that it may notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation. Therefore, the conference intends that the "charge" requirement will be satisfied by the *filing of a written statement* which identifies the potential defendant and generally describes the action believed to be discriminatory.' House Conf. Report No. 95-950, Mar. 14, 1978, p. 12, 1978 U.S. Code Cong. and Adm. New., p. 1006.

Indeed, in support of his argument that he had filed a charge of discrimination, the Petitioner at page 15 quoted the following language in his Petition:

> The Conferees intend that the 'charge' requirement will be satisfied by the filing of a *written statement* which identifies the potential defendant and generally describes the action believed to be discriminatory. (Emphasis added.)

The Petitioner, of course, emphasized other language in this quote and failed to underline the requirement of a "written statement." Considering the legislative history, there is no question that Congress intended that a *written charge* would be required to satisfy §626(d).

The third element of *Mahasco*, the underlying purpose of the act, was found by the Fourth Circuit to be conciliation and conference, not private enforcement. The requirement of a written charge seems to be the least that could be asked before the administrative agency undertakes its task to resolve the problem. By enacting §626(d) Congress obviously intended that some type record be made regarding all charges filed with the notice agency. While the Petitioner complains that the Fourth Circuit's opinion leaves it to the "subjective decision" of an employee of the government to determine whether a charge has been filed, the requirement of a written charge eliminates his objection. Whirlpool disagrees with the Petitioner's argument that an oral charge satisfies the filing requirement. But, if such were allowed, obviously, it would be better to rely upon the memory and judgment of trained agency personnel rather than the claimant, a partisan. Again, a written charge eliminates this issue.

B. The Cases Relied on By The Petitioner Do Not Support His Position That An Oral Charge Is Adequate.

In most of the cases cited by the Petitioner in support of his argument that a written charge is not required, the issues were *not whether written charges were required, but rather whether tolling was appropriate*. The Petitioner contends that the question of whether a written charge is required has created numerous conflicts among the courts. However, the real issue which has created conflict has not been written versus oral charges, but whether and under what circumstances the charge requirement could be tolled.

For example, in *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, (3rd Cir. 1977) the two issues were when the time for filing began and whether tolling was applicable. Whether a charge could be oral was never discussed by the court. Likewise, in *Moses v. Falstaff Brewing Corporation*, 525 F.2d 92 (8th Cir. 1975), the only issue was whether plaintiff's *written* notice of intent to sue was timely. In *Love v. The Pullman Company*, 404 U.S. 522, 92 S. Ct. 616, 30 L.Ed.2d 679, (1972), a Title VII case, the plaintiff also filed a written charge. In *Jennings v. American Postal Workers Union*, 672 F.2d 712 (8th Cir. 1982) the claimant filed an untimely charge alleging discrimination with the EEOC. Once again, the issue was whether the EEOC's earlier *refusal* to accept the claimant's charge was cause to toll the time period for filing.

Finally, the holding in *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911 (W.D. Ga. 1973), a district court case repeatedly cited by the Petitioner and the District Court as support for allowing an oral charge, was specifically disapproved by the Court of Appeals for the Fifth Circuit in *Woodard v. Western Union Telegraph Company*, 650 F.2d 592 (5th Cir. Unit B 1981), holding that the plaintiff's action should have been dismissed for failure to file a written notice of intent to sue. In the only other case cited by the Petitioner, *Noto v. J.F.D. Electronics Corporation*, 446 F. Supp. 92 (E.D.N.C. 1978) the court relied upon *Woodford* to support its opinion that an oral charge would be sufficient. Obviously, since *Woodard*, such reliance is no longer valid.

Thus, a review of the Petitioner's cases reveals that, contrary to his contention, the Fourth Circuit's determination that a *written* charge is required is consistent with the opinions of this Court and other circuit courts.

C. The Evidence Clearly Reveals That The Petitioner Failed To File A Charge Alleging Unlawful Discrimination.

The Petitioner concedes that he filed no written charge and the Fourth Circuit held that was fatal. To avoid dismissal for failure to file a written charge, the Petitioner argues that an oral charge is sufficient and he filed an oral charge. Even if it would be sufficient to meet the filing requirement, there is no evidence the Petitioner filed an oral charge.

When the Petitioner went to the Department of Labor in 1977, the Petitioner told Mr. Smith ". . . that the only reason I could see that they discharged me was discriminating on age . . ." and that he thought he was fired because of his age. App., p.1, *infra*. The Petitioner further testified that Mr. Smith then told him to come back and see him, if the Petitioner had more information.

By telling the Petitioner to come back when he had more information, Mr. Smith clearly indicated that the Petitioner's information was insufficient for a charge. Obviously, the Petitioner's statement that he thought he was discharged because of his age was not enough.

When the Petitioner returned to the Department of Labor in 1979, he did not even attempt to file a charge of discrimination. Contrary to the erroneous finding of the trial judge, very little occurred during the Petitioner's second visit. In determining whether the Petitioner filed a timely charge in 1979, the trial court stated:

> Mr. Greene then returned to the Department of Labor, where he informed Mr. Fred Carlock of the Charlotte Office of the United States Department of Labor of the evidence of the willfulness on the part of the defendant which he had learned from the *Spagnuolo* case.

The undisputed evidence reveals that Mr. Greene did not inform Mr. Carlock ". . . of the evidence of the wilfullness on the part of the defendant. . ." nor did he inform Mr. Carlock of any additional information. In fact as shown by the following testimony of the Petitioner, he was "still gathering information" at the time he talked with Mr. Carlock.

Q. What did you tell him?
A. I didn't really tell him anything.
App. p. 3, *infra*.

Q. Did you tell the gentlemen in the Labor Department in the fall of '79 that you intended to sue Whirlpool?
A. I don't remember telling him anything at that time.
Q. Do you remember telling him anything other than you were looking for Mr. Smith?
A. I was still gathering information, sir, at that time.
Q. The last time you visited the Labor Department, you were still gathering information. Is that correct?
A. Oh, yes.
App., p. 5, *infra*.

Again, according to the Petitioner's own testimony, there is absolutely no evidence that he filed a charge as required by 29 U.S.C. §626 (d) on his first or second visit to the Department of Labor, nor is there any evidence to support the Petitioner's contention that the requirement should be waived. The Petitioner alone is responsible for his failure to file a charge of discrimination. Therefore, the Petitioner's action is barred by his failure to file a charge of discrimination as required by §626 (d).

II.

The Fourth Circuit's Decision That The Time Period For Filing A Charge Was No Longer Tolled Once Petitioner Received Actual Notice Of The Filing Requirements Is Consistent With The Rulings Of This Court And Other Circuits.

In order to avoid having his suit dismissed for failure to file a charge, the Petitioner contends that he should be excused from filing a charge because of the failure of Whirlpool to post a notice setting forth employees' rights under the ADEA. Failure to post notice relates only to lack of knowledge of one's rights under the ADEA. Once the Petitioner obtains actual knowledge of his rights under the ADEA, the failure to post by a defendant is no longer relevant and does not toll the time to file a charge. *Templeton v. Western Union Telegraph Company*, 607 F.2d 89 (5th Cir. 1979). *Smith v. President Lines*, 571 F.2d 102, 16 FEP Cases 712 (2nd Cir. 1978); *Kephart v. Institute of Gas Technology*, 581 F.2d 1287 (7th Cir. 1978); *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1978); *Edwards v. Kaiser Aluminum and Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975). The Petitioner knew enough about his rights to contact the DOL as early as November 1977—only two and one half weeks after his termination. Further three or four days later, the Petitioner received a pamphlet outlining all of his rights under the ADEA, including the applicable time limits and he did nothing until two years later when he learned that the person who fired him had won his discrimination case. Any way the facts are analyzed, it is unmistakenly clear that even if tolling were applicable in this case, it would be of no help to the Petitioner because he has yet to file a charge.

Finally, Petitioner attempts to set up a conflict between the Fourth Circuit's decision and that of other circuit's regarding the issue of tolling or waiver. The Petitioner contends that Whirlpool's failure to post the required notices containing information regarding the ADEA excuses him from the necessity of filing a charge of discrimination. He contends that the Fourth Circuit's holding that Whirlpool's failure to post the notice did not waive or toll the requirement of filing a charge of discrimination, conflicts with decisions of other circuits and causes confusion in the law.

In support of this position, the Petitioner contrasts two quotations — one from *Posey v. Skyline Corporation*, 702 F.2d 102 (7th Cir. 1983) and one from the Fourth Circuit's opinion in this case. However, in both quotations, the Petitioner omits the *very* next sentence from each of those opinions. The omitted language clearly reveals that rather than being in conflict, *the cases are completely consistent*.

The Petitioner's quote from *Posey* is as follows:

> [T]o insure that employers would not breach the posting requirement without penalty, as well as to effectuate the remedial purposes of the ADEA, we concluded in *Kephart* that the 180-day period was tolled by an employer's failure to post a conspicuous notice of ADEA rights (702 F.2d at 105).

The very next sentence is:

> Specifically, we held that if an employer fails to post in a conspicuous manner the required notice of ADEA rights, the 180 day period will not begin to run until the employee either retains an attorney or *acquires actual knowledge* of his rights under the ADEA. (702 F.2d at 105) (Emphasis added.)

Likewise, in quoting from the opinion of the Fourth Circuit, the Petitioner omitted the statements regarding actual notice. The quote from the Fourth Circuit's opinion set forth by the Petitioner is:

> Nevertheless, we do not agree with the district court that the 180-day time period for filing a charge was tolled by Whirlpool's failure to post the required ADEA informational notices on its premises.

The next two sentences which the Petitioner omitted are:

> The evidence clearly reveals that from Greene's first visit to the DOL in November, 1977, he acquired actual knowledge of the fact that a charge alleging discrimination must be filed with the DOL within 180 days after the alleged unlawful practice occurred. Therefore, under these circumstances, there is nothing to warrant the tolling of the usual 180-day filing requirement.

It is obvious that the Fourth Circuit's opinion is consistent with *Posey*. Failure to post ADEA notices constitutes grounds for a waiver of the filing requirement only when it impairs the claimant's ability to pursue his rights, which was not the case here. This Petitioner had actual knowledge of his rights under the ADEA, including the filing requirement, no later than two weeks after his termination.

CONCLUSION

Whirlpool submits that the Petition for Certiorari should be denied for the reasons that: (1) the Fourth Circuit's decision requiring a written charge alleging discrimination to be filed to satisfy the provisions of 29 U.S.C. §626 (d) upholds the underlying purpose of the ADEA and there is no conflict between the Fourth Circuit's decision and those of this Court and other circuit courts; and (2) the Fourth Circuit's decision that the time for filing a charge of discrimination was not tolled by Whirlpool's failure to post ADEA notices when the Petitioner had actual knowledge of his rights under the act is consistent with the opinions of this Court and other circuit courts.

Respectfully submitted this 25th day of November, 1983.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has this day served other parties in this action by causing three copies each of the foregoing Respondent's Brief In Opposition to Petition to be deposited in the United States Mail, postage prepaid and properly addressed to:

C. MICHAEL WILSON
Gerdes, Mason, Brunson & Wilson
Suite 1001 Cameron Brown Building
301 South McDowell Street
Charlotte, North Carolina 28204

This the 25th day of November, 1983.

/s/ JULIA V. JONES
Julia V. Jones

APPENDIX

Pages 372-374, 377-379 of Joint Appendix filed in the Appeal to the Fourth Circuit.

(372)

Q. Where was that office located?

A. 316 East Morehead Street.

Q. What did you tell Mr. Smith?

A. I went into the office and the receptionist referred me to Mr. Bob Smith's office. I went into Mr. Smith's office and I told him that I had worked for the Whirlpool Corporation all these years and that my performance had been okay, as far as I could determine; that the only reason I could see that they discharged me was discriminating on age because I was six weeks past 55. He kind of laughed, and he says I'm past 65 myself, but he says they can't force me to retire until I'm 70.

Q. Did you tell him you thought you were fired because of your age?

A. Yes, sir.

Q. What else did Mr. Smith tell you?

A. He told me they were out of the booklets they had that explained the discrimination case, but he also made the statement to me, he says I'll mail you one of those as soon as I can get one, and if you find it's willful and so forth, he says if you find out enough information on it you get back with us, and I says I'll certainly do that, Mr. Smith. He says you have got a time limit up to two years if you find they are willfully discriminating against you, and from that date on I never did get to see Mr. Smith again.

Q. Do you remember the date you saw him again?

(373)

A. It was in November of '77. I would say around the 17th, 18th or in that time frame there.

Q. Let me show you Plaintiff's Exhibit 88. Let me ask you if you can identify that.

A. Yes, sir.

Q. What is it?

A. That's the envelope mailed to me from the Department of Labor, Room 401, 216 East Morehead Street.

Q. And does that envelope contain a document?

A. Yes, sir. It has a date on it of November 21, 1977, and it has a document in it.

Q. What's the title of the document?

A. Discrimination in Employment Act of 1967 as Amended, Age Discrimination in Employment.

Q. Did you receive that document?

A. Yes, sir.

MR. WILSON: That's all the questions I have.

COURT: Cross-examination?

MR. ALLRED: Yes, Your Honor, just a little bit.

CROSS-EXAMINATION

BY MR. ALLRED:

Q. Mr. Greene, when you received the envelope from the Department of Labor which was postmarked November 21, 1977, did you receive it within a few days of November 21, 1977?

A. I must have, sir.

(374)

Q. Would it be fair to say you received it in November of 1977, within 30 days from the time that you had been terminated by Whirlpool?

A. Yes, sir.

Q. Did you read the booklet that was sent to you?

A. I glanced through the booklet, sir.

Q. Well, now, did you read it?

A. Yes, I looked through the booklet.

Q. You read everything that was in the book?

A. I must have. I looked through the booklet.

MR. ALLRED: Mr. Wilson, you might want to give Mr. Greene the booklet.

(Paperwriting handed to the witness)

Q. I direct your attention to Section 7 that begins on Page 4, and I direct your attention particularly to Section 7(d). Would you read Section (d) to the jury, please?

MR. WILSON: Your Honor, I'm going to object to that, because the section he's reading is not the section applicable to this case. It's the section Mr. Greene received but the amendment made retroactive by Congress made this particular language inapplicable to this case.

COURT: Is this going to present a question of law or a question of fact?

MR. WILSON: I think, Your Honor, it would be law.

COURT: If it's what the statute means, it would be my

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(377)

A. Probably was.

Q. December?

A. No, it was in the fall.

Q. In the fall?

A. Yes.

Q. Somewhere from September 21st to December 21st? I believe that's the fall.

A. If that is the fall of the year.

Q. Did you go and visit with this gentleman?

A. Yes, sir.

Q. What did you tell him?

A. I didn't really tell him anything. I went to visit with him and see if he had anything in the office where I visited with Mr. Bob Smith, and he really did. They remembered me visiting with Mr. Smith.

Q. Was there any record at all of your having visited with Mr. Smith?

MR. WILSON: Objection. He doesn't know if there was a record in the offices.

COURT: Do you know the answer to the question?

A. No, sir. How would I know if they had records, sir?

Q. You went to ask him if they had some. What did the gentleman at the Labor Department tell you?

A. He didn't say whether they had any or not, that I recall.

Q. Tell us the conversation.

(378)

A. I was talking about it, that I was in to see Mr. Smith at a prior time which Mr. Smith mailed me that information there and that Mr. Smith said whenever I had additional information that age discrimination was a factor in the case to get back with him. In the fall of '79 I had additional information that it was age discrimination. I went back to the Labor Department and asked Mr. Carlock.

Q. What did you tell Mr. Carlock?

A. I told him that I had been in to see Mr. Smith before and if Mr. Smith was around I would like to talk with him.

Q. He told you Mr. Smith was no longer there?

A. No, he did not say that.

Q. What did he tell you?

A. He didn't say anything about that. Mr. Smith had been transferred to Gastonia or some place.

Q. Did he say he would handle the matter for you?

A. He handled the matter as far as I was concerned.

Q. Did you tell him that you were going to file an intent to sue?

MR. WILSON: Objection. He's quoting again from the statute which is inapplicable.

COURT: Objection's overruled. Go ahead and answer the question.

Q. Did you tell the gentleman in the Labor Department in the fall of '79 that you intended to sue Whirlpool?

(379)

A. I don't remember telling him anything at that time.

Q. Do you remember telling him anything other than you were looking for Mr. Smith?

A. I was still gathering information, sir, at that time.

Q. The last time you visited the Labor Department, you were still gathering information. Is that correct?

A. Oh, yes.

Q. So you didn't communicate any intentions at all to the Labor Department at that time?

A. I don't remember whether I did or not.

MR. ALLRED: Thank you, sir.

MR. WILSON: Your Honor, may we approach the bench? I have redirect but I don't want to proffer the questions until I mention it to you.

(Conference out of the hearing of the court reporter)

COURT: We'll take our morning recess.

SHORT RECESS

(The following takes place out of the presence of the jury.)

(Mr. Greene returns to the witness stand.)

REDIRECT EXAMINATION

BY MR. WILSON:

Q. Mr. Greene, do you remember what month it was you went to the Department of Labor?

A. November, 1977.

Q. Was it October or November?